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THE

Brief

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, deceased,
Petitioner,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

STATEMENT OF THE CASE.

On January 16, 1899, Herman D. Cable made an application in writing to the United States Life Insurance Company, through one James F. McCabe, for insurance on his life in the sum of $50,000, which application was forwarded to the New York office of the insurance company, and on the 6th day of February, 1899, a policy was issued upon the life of said Cable in the sum of $50,000, payable in thirty consecutive annual instalments of $1,666.66 each, or a commuted value of $30,000, to the estate of said Cable. The written application which, by its terms, was made a part of the policy, was signed by said Cable, and contained the following provision:

"It is hereby declared and agreed * * * that the policy to be issued hereon shall take effect only upon the payment of the first premium and delivery of the policy during my lifetime, sound health and insurable condition."

George S. Lord, who was a neighbor and friend of Cable, and interested with him in numerous business transactions, at the same time made a like application to the insurance company and a policy was also issued to him and both were forwarded from the New York office of the insurance company to its Chicago office and were received at the latter office on the 20th day of February, 1899. The policies were then turned over by the general agent of the insurance company in Chicago, to one T. J. Finney. Finney was a life insurance broker not regularly employed by any insurance company, but he had done business with the United States Life Insurance Company through its Chicago general agent for a number of years and had procured insurance on the life of Cable in another company, which had lapsed in November, 1898. James F. McCabe was also an insurance agent or broker and was requested, through Finney, to obtain applications for the United States Life Insurance Company. He, however, was not personally known to the Chicago general agent. Upon the delivery of the two policies to Finney, the gross amounts of the premiums were charged against him by the respondent's general agent and he subsequently paid to such general agent the amount due on such premiums. The applications of both Cable and Lord were obtained from them by McCabe under an agreement between him and Finney, and when procured were delivered to Finney. When Finney received the policies he in turn delivered them to McCabe on February 21, 1899. Thereupon McCabe called at the office of Cable, having both policies

with him, but Cable declined to accept his policy at that time, stating that he did not have time to look into the matter, but would be guided a good deal by what Lord said and did. Afterwards, on the same day, McCabe called at Lord's office, found him very busy, and left his policy, together with the financial statement of the company, and told him that he, Lord, might send a check for the premium. On the same day the Cable policy was returned to Finney. McCabe then went out of town and returned on the 27th of February, 1899, and going to Lord's office asked for the payment of the premium on his policy. Mr. Lord thereupon asked McCabe if he had also the Cable policy. McCabe responded that he had not, but would get it in a few minutes. McCabe then went to Finney's office, procured the Cable policy and returned with it to Mr. Lord's office. On handing it to Mr. Lord he said: "Is Mr. Cable all right?" Lord answered, "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." Thereupon McCabe delivered both of the policies and received payment of the premiums. Mr. Lord then took the Cable policy and delivered it to a member of Mr. Cable's family on the evening of the same day. Mr. Lord had been authorized in advance by Mr. Cable to accept and pay for the latter's policy and the premium advanced by Mr. Lord was subsequently repaid him.

On February 21, 1899, when the policy was first presented to Mr. Cable, he was in sound health, but on the 24th of February he was taken ill with incipient pneumonia and was attended by a physician in the evening of that day and put under the care of a trained nurse. His disease developed into a case of acute pneumonia. He was

confined to his bed from the evening of February 24th until March 2, 1899, when he died.

Mr. Lord was aware of the illness of Cable at the time he received the policy and paid the premium, but the attending physician had informed the family that he expected Mr. Cable would recover from his illness and Mr. Lord, knowing this fact in good faith, and without any attempt to defraud or conceal the real condition of the health of the said Cable, made the statement above quoted prior to the time of the delivery of the policy and payment of the premium as above stated to McCabe, and McCabe made no further inquiries in regard to the condition or illness of Mr. Cable. Mr. Cable died on the 2nd of March, 1899, of heart failure, which was the result of his illness. Until the evening prior to his death his physician confidently expected Mr. Cable's recovery. After the death of Mr. Cable the insurance company tendered a return of the premium received by it, and demanded the surrender of the policy, which was refused. Proofs of death were filed with the insurance company and on May 11, 1899, petitioner, who had been appointed administratrix of the estate of Herman D. Cable, brought suit in the Superior Court of Cook County, Illinois, for the commuted value of the insurance policy, being the gross sum of $30,000. The action was begun by the filing of a præcipe and the issuance of a summons, which was placed in the hands of the sheriff of Cook County, Illinois, for service. About an hour later the insurance company filed its bill of complaint in the Circuit Court of the United States, asking for a cancellation of the policy and an order enjoining the petitioner from prosecuting her suit in the State Court. The bill of complaint alleged that at the time

of the delivery of the policy on the 27th day of February, 1899, the life of Cable had been despaired of; that Lord obtained a delivery of the policy with full knowledge of the dangerous illness of Cable and the stipulation in the policy that it should take effect only upon prompt payment of the first premium and its delivery during the sound health and insurable condition of Mr. Cable; that the insurance company had no knowledge of the illness of Cable, but such fact was purposely and wilfully concealed from it, and that Lord was not authorized to receive the policy or pay the premium thereon, but such payment was made out of his own funds, without the knowledge and consent of Cable and that a deliberate fraud was practiced in the procurement of the delivery of the policy.

A general and special demurrer was filed to the bill of complaint. Leave was subsequently obtained to file an amended and supplemental bill, which made practically the same allegations as the original, but set up the bringing of the suit in the State Court. The demurrer filed to the original bill was ordered to stand as a demurrer to the amended and supplemental bill.

Upon argument of the demurrer before Judge Kohlsaat, the amended and supplemental bill was dismissed for want of equity. (Pr. Rec., 24.)

The decision of Judge Kohlsaat was based upon the authority of *Phoenix Life Insurance Co.* v. *Bailey*, 13 Wall., 616. The decree dismissing the bill upon appeal was reversed by the Circuit Court of Appeals, with directions to overrule the demurrer to the bill. The Court of Appeals in its opinion practically held that the respondent, by agreeing with the State of Illinois not to remove any cause brought against it in the state courts to the United States

Court, thereby obtained the right to file its bill in equity in the Federal Court to cancel a life insurance policy after loss had occurred and suit been brought on the policy in the state court, and that the constitution gave respondent the right to have its cause tried in the Federal Court, and inasmuch as the agreement under which it obtained its license from the state was so burdensome in the event of the removal of a suit brought in the state court to the Federal Court, the Federal Court would take charge of the litigation on its equity side, notwithstanding the matters set out in the bill of complaint could be set up in the state court as a defense to the action on the policy. A further ground was given that the action at law was under the control of the petitioner.

United States Life Insurance Co. v. *Cable,* 98 Fed. R., 761.

Upon filing the mandate of the Circuit Court of Appeals, the cause was redocketed in the Circuit Court and an answer filed by petitioner denying the various charges of fraud made in the bill of complaint and asserting that the court should not take jurisdiction of the cause, for the reason that respondent had a full and adequate remedy at law by setting up the matters urged in the bill, as a defense to the action in the state court. (Pr. Rec., 26-31.)

A reference of the cause was had to William M. Booth, a master in chancery, who made a finding of facts. (Pr. Rec., 34-44.) The master's report practically finds the allegations of the answer to be true, except as to the nature of the information which had been conveyed to the agent of respondent at the time of the delivery of the policy, and payment of the premium. The policy had been tendered Mr. Cable on the 21st day of February, 1899, and declined

by him at that time, he stating that he did not have time to look into the matter, but would be guided a good deal by what Mr. Lord said and did.

On February 24th Mr. Cable fell ill of pneumonia, and on the 27th day of February, 1899, the agent called upon Mr. Lord, who asked him if he had Mr. Cable's policy with him, and upon his reply that he had not, he was told to get it, and that he, Lord, would pay the amount of the premium on his policy, as well as that of Mr. Cable. McCabe got the policy and handed it to Mr. Lord, saying as he did so: "Is Mr. Cable all right?" and Mr. Lord responded, "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." (Pr. Rec., 37.) The master concluded from this statement that while it was substantially true, it was deceptive in its nature and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or lead him to suspect it. (Pr. Rec., 39.)

The court sustained an exception to this finding of the master and affirmatively found that at the time Lord was asked by McCabe as to the then condition of Cable, he in good faith, and without any intention to defraud the complainant or conceal the real condition of the health of said Cable, stated that Cable had been sick for two or three days, but was no worse than he had been during the last forty-eight hours, and that Lord made no further statement in regard to the condition of Cable, nor were any further inquiries made by McCabe in regard thereto, and concluded therefrom that the policy was procured on behalf of the deceased by constructive fraud, but that no actual fraud was intended or practiced in the delivery of the same. Thereupon a decree was entered adjudging the policy void and directing its cancellation. (Pr. Rec., 148, 149.)

On October 1, 1901, the Circuit Court of Appeals affirmed this last decree entered by the Circuit Court. The case was heard before Judges Woods, Jenkins and Grosscup. Prior to the time of the rendering of the opinion, Judge Woods had departed this life, but it is stated that he concurred in the conclusions reached. Judge Grosscup concurs in the opinion, the jurisdictional question having been settled upon the former appeal. (Pr. Rec., 180.)

It was attempted at the last hearing to have the court reconsider its former opinion upon the jurisdictional question, but this it declined to do. The affirmance of the decree is based upon the ground that the information which was given by Lord to McCabe at the time of the delivery of the policy, was not sufficient to put the respondent upon notice as to the then condition of Cable.

Errors Relied Upon.

1. The Circuit Court of Appeals erred in reversing the decree of the Circuit Court dismissing the amended and supplemental bill and directing the Circuit Court to overrule the demurrer thereto.

2. The Circuit Court erred in overruling the demurrer of petitioner to the amended and supplemental bill of complaint.

3. The Circuit Court erred in ordering the cancellation of the policy of insurance issued to the insured.

4. The Circuit Court erred in holding and adjudging the information given at the time of the delivery of the policy, that the insured had been sick for two or three days, but was no worse than he had been for the last forty-

eight hours, without giving further details as to the nature and character of such illness, was a constructive fraud which vitiated the policy, notwithstanding no further inquiry was made as to the nature or character of the illness.

5. The Circuit Court erred in not dismissing the amended and supplemental bill of complaint and remitting the respondent to make its defense to the action at law brought against it in the state court.

6. The Circuit Court erred in not entering a decree in favor of the petitioner against respondent directing the payment of the sum of thirty thousand ($30,000) dollars, as provided by the policy of insurance.

7. The Circuit Court of Appeals erred in affirming the decree of the Circuit Court directing a cancellation of the policy of insurance.

BRIEF AND ARGUMENT.

I.

WHERE A SUIT AT LAW IS BROUGHT AGAINST AN INSURANCE COMPANY FOR A LOSS SUSTAINED UNDER AN INSURANCE POLICY, A COURT OF CHANCERY HAS NO JURISDICTION TO CANCEL THE POLICY, SINCE EVERY GROUND SET FORTH IN THE BILL OF COMPLAINT CAN BE SET UP AND TRIED AS A DEFENSE IN THE ACTION AT LAW.

To briefly summarize the cause of action set out in the respondent's amended and supplemental bill of complaint: it is an attempt to secure a decree cancelling a policy of insurance after the death of the assured and the rights of the beneficiary had matured, and also to secure an injunction against the beneficiary from prosecuting an action in the courts of the State of Illinois, which had been brought by her upon the insurance policy prior to the filing of the bill of complaint.

The assumed ground for interference upon the part of the Federal Court alleged in the bill is, first, that the law of the State of Illinois forbids respondent from removing the case instituted against it in the state court to the Federal Court, and should it do so, its license to further do business in the State of Illinois would be revoked; second, the courts of the United States recognize a different rule of law from that enforced in the state courts and that if the cause is tried in the state court under the laws as there administered, judgment will be had against the respondent for the value of the policy, while under the holdings of the Federal Courts the respondent would be relieved from all liability thereunder.

Judge Kohlsaat, sitting in the Circuit Court, upon demurrer entered a decree dismissing the bill upon the ground that respondent had a full, adequate and complete remedy by setting up its defense to the action at law which had been brought against it in the Superior Court of Cook County, Illinois. Upon appeal by the respondent to the Circuit Court of Appeals for the Seventh Circuit, this decree was reversed and the reason given therefor was that the respondent, being a citizen of the State of New York, had under the Constitution of the United States the right to come into a Federal Court for adjudication, and as it was forbidden by the laws of the state which had licensed it to do business therein to remove the cause brought against it under penalty of forfeiting its right to do further business in the state, that such a provision was so onerous as to practically deny this right to remove the cause and the Federal Court, on its chancery side, would take jurisdiction, notwithstanding had the action at law been brought in the Federal Court, the chancery suit would not lie.

Section 723 of the Revised Statutes of the United States provides:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

In *Phoenix Life Insurance Co.* v. *Bailey*, 13 Wall., 616, it is held that a suit in equity will not lie to cancel an insurance policy for fraud in its procurement, *after* the death of the assured. It is there said:

"Fraudulent misrepresentations and the fraudulent suppression of material facts are the principal grounds alleged for the relief prayed in the bill of complaint, and it must be conceded that the proofs introduced by the complainants tend strongly to support the allegations which contain those charges. Those allegations in the bill of complaint are de-

nied in the answer, and the respondent has introduced proofs in support of those denials, but it is not going too far to say that the weight of the evidence as exhibited in the record is adverse to the pretensions of the respondent, nor does it appear that any different views were entertained by the subordinate court. Grant all that, and still it does not follow that the decree in the court below is erroneous, as the bill of complaint may well have been dismissed upon grounds wholly disconnected from the merits of the controversy.

Suits in equity, the Judiciary Act provides, shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law, and the same rule is applicable where the suit is prosecuted in the Chancery Court of this district.

Hipp v. *Babin*, 19 How., 271 (60 U. S. XV 633).

Parker v. *W. L. Cotton & Woolen Co.*, 2 Black, 545 (67 U. S. XVII, 333).

Boyce v. *Grundy*, 3 Pet., 210.

Graves v. *Ins. Co.*, 2 Cranch., 444.

1 Stat. at L., 82.

Much consideration was given to the construction of that section of the Judiciary Act in the case first referred to, and also to the question whether a party seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court without hesitation came to the conclusion that he could not, if his remedy at law was as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

Most of the leading authorities were carefully examined on the occasion, and the court came to the following conclusion, which appears to be correct: That whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must in general proceed at law, because the defendant under such circumstances has a right to a trial by jury.

Foley v. *Hill*, 1 Phil., 399; s. c., 2 H. of L. Cas., 28.

Fire Ins. Co. v. *Delavan,* 8 Paige, Ch. R., 422.

Alexander v. *Muirhead,* 2 Desaus, 162; 5 Am. Law Rev., 564.

* * * * *

Jurisdiction may also be exercised by courts of equity to rescind written instruments in cases where they have been procured by false representations or by the fraudulent suppression of the truth, if it appear that the rescission of the same is essential to protect the opposite party from pecuniary injury. Equity will rescind or enjoin such instruments where they operate as a cloud upon the title of the opposite party, or where the instruments are of a character that the vice in the inception of the same would be unavailing as a defense by the injured party if the instruments were transferred for value into the hands of an innocent holder. Title deeds fraudulently procured may, under such circumstances, be decreed to be canceled or reformed, as the case may be, and bills of exchange or promissory notes may be enjoined and practically divested of their negotiable quality.

Such jurisdiction also extends to the protection of letters patent against infringements, and is exercised in many cases to prevent waste, and for many other judicial purposes, but the rule in the Federal Courts is universal that if the defendant has a good defense at law, and the remedy at law is as perfect and complete as the remedy in equity, an injunction will not be granted.

Whether the remedy sought in this case would have been available if the suit had been instituted before the death of the person whose life was insured, it is not necessary to determine, as no such question is involved in the record. Suffice it to say upon that topic that the complainant has not referred the court to any decided case which supports the affirmative even of that inquiry, but the difficulty in the way to such a conclusion in the case before the court is much greater, as by the death of a *cestui que vie* the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the

policies, and the sums insured became a purely legal demand, and if so, it is difficult to see what remedy, more nearly perfect and complete, the appellants can have than is afforded them by their right to make defense at law, which secures to them the right of trial by jury.

Foley v. *Hill*, 2 H. of L. Cas., 45.
Thrale v. *Ross*, 3 Bro., Ch. 56.
Arundel v. *Holmes*, 4 Beav., 325.
Norris v. *Day*, 4 You. and C., 475.

* * * * *

Courts of equity, unquestionably, have jurisdiction of fraud, misrepresentation and fraudulent suppression of material facts in matters of contract; but where the cause of action is 'a purely legal demand' and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal Court, as it is clear that the case, under such circumstances, is controlled by the 16th section of the Judiciary Act."

A very similar case to the one at bar is that of *Home Insurance Co.* v. *Stanchfield*, 1 Dill., 424. There a fire insurance policy had been issued and after the loss, it was claimed by the company that it discovered the policy had been secured by fraudulent representations. Before a suit was instituted upon the policy, the insurance company filed its bill in the Federal Court to enjoin the bringing of the suit at law upon the policy. The case came for hearing before Justice Miller and Judge Dillon. Upon the merits, in a very elaborate opinion and after reviewing a large number of authorities, Judge Dillon held that a suit in equity would not lie to enjoin an action upon an insurance policy after loss, for the reason that the insurance company had a complete remedy by making its defense to the action at law. Justice Miller concurred in this opinion and stated that after loss, a bill in equity could not be maintained to cancel the policy.

Under the authority of the Phœnix Life Insurance case, *supra*, a similar bill was dismissed in the Circuit Court of the United States for the Eastern District of North Carolina.

Aetna Life Ins. Co v. *Smith*, 73 Fed., 318.

The Circuit Court of Appeals attempted to distinguish the case at bar from that of the *Phoenix Life Insurance Company* v. *Bailey, supra*, upon the ground that the law action against the Phœnix Life Insurance Company was pending in the courts of the District of Columbia, while here the suit on the policy had been brought in the state court. Without this alleged distinction, it must be conceded that the decision of the Circuit Court of Appeals is directly opposed to the opinion of this court in the Phœnix Life Insurance Company case.

The statutes of the State of Illinois concerning the regulation of business of foreign insurance companies provides that it shall be unlawful for any insurance company to do business in this state until it shall have filed a written application for a license to do business in the state with the auditor of public accounts, and that "it will accept a license therefor according to the laws of this state and that said license shall cease and terminate in case and whenever it shall remove or make application to remove into any United States court any action or proceeding commenced in any of the state courts of this state, upon any claim or cause of action arising out of any business transaction, in fact, done in this state."

The second section provides that upon complying with the requirements of this act a license shall be issued to the insurance company to carry on its business within the State of Illinois.

Section 3 is as follows:

"If any such incorporated company, association or partnership shall remove, or make application to remove, into any United States court any action or proceeding commenced in any state court of this state upon a claim or cause of action arising out of any business, or transaction in fact done in this state, although there may have been a stipulation authorizing such removal, or if it shall violate, or fail to comply with, any of the other requirements or conditions now imposed by existing law, it is hereby made the imperative duty of the auditor of public accounts at once to revoke, cancel and annul the license issued to such incorporated company, association or partnership; and thereafter no such incorporated company, association or partnership shall transact within this state any of the business for which it was incorporated, until again duly licensed. In case such revocation of license shall be made because of the removal of, or the attempt to remove any action from a state court of this state to any United States court, no renewal of such license shall be made within three years after such revocation. Whenever such license shall be revoked, the auditor of public accounts shall give notice of such revocation by mail to the president and secretary of such corporation and shall also cause a notice of the same to be published three times in some weekly newspaper published in the City of Springfield. A certified copy of the order of removal, shall be sufficient evidence of the removal of any cause."

Hurd's R. S. (1899), Chap. 73, Sec. 33.

The respondent complied with the provisions of this act by filing its written application for a license and was regularly authorized to do business within the State of Illinois.

A foreign insurance company has no right to do business in the state without license and contracts entered into by it are controlled by the statutes of the state.

New York Life Ins. Co. v. *Cravens*, 178 U. S., 389.

The statute of the state under which respondent was licensed does not forbid a removal to the Federal Court of suits brought against it in the state court, but simply reserves the right to revoke the license issued under the written agreement given by respondent to the state, if it does not submit its controversies to the judgment of the state courts and stand upon the same footing as domestic companies. This statute is constitutional and the agreement made by the respondent under which it procured its license is valid and binding.

Doyle v. Continental Insurance Company,
94 U. S., 535.

The Circuit Court of Appeals in effect ruled that by securing its license under this statute the respondent had the right to apply to the chancery side of the Federal Court in the first instance and deprive the beneficiary in a policy issued by it of the right to a trial by jury guaranteed by the Constitution of the United States.

The first reason given for this is that the respondent "being a citizen of New York and the defendant a citizen of Illinois, plaintiff under the constitution has the right to come to the Federal Court for an adjudication. For a person entitled to litigate in the Federal Court it has not an adequate remedy at law to be invited into a state court by its antagonist to adjudicate its rights." This reasoning is unsound, because the respondent had the right to remove the action brought against it to the Federal Court if it saw fit and the statute of the state does not attempt to deny such right.

Respondent procured its license to do business in the state upon the agreement that it would not remove such a cause and that if it did so, its further right to do business

in the state might be revoked. But there is no provision in the statute, or its contract, which forbids such a removal. It can do so at its own option, but it is said that if the suit is removed then the state authorities will revoke the license. This may be true, but the insurance company has no right to do business in the State of Illinois, except upon consent of the state authorities. The state has the right at any time, with or without reason, to revoke its license to further carry on its business within the limits of the state. Nor can there be any just reason why a foreign company should not be compelled to have its causes tried in the same courts as do domestic insurance companies. If it be held that the act of the State of Illinois under which respondent obtained its license is unconstitutional, so far as the same refers to the removal of a cause to the United States Courts, then the respondent had a perfect right to wholly disregard the statute and remove the action brought by petitioner to the Federal Court. In such case, should the state authorities attempt to revoke the license of respondent, such action could be enjoined by the Federal Court. An unconstitutional law is no law and it is the same as if no attempt had ever been made to enact such a statute. If placed upon the statute books, it may be disregarded with impunity and ought not to be a pretext whereby the Federal Courts grasp out and seize jurisdiction of cases which they could not possibly have without such an unconstitutional statute.

It is apparent that Judge Grosscup, sitting in the Court of Appeals upon the last hearing of the case in that court, was of the opinion that the first decision rendered by the Circuit Court of Appeals was not sound. The effect of this decision, if adhered to, is to give foreign insurance companies in almost every state of the Union, rights possessed

by no other citizen. By entering into a valid contract with the state to procure its license to do business therein, conditioned that if it removes an action at law brought against it in the state court to the Federal Court, its license to do business within the state may be revoked, it thereby becomes enabled to apply to the chancery side of the Federal Court in every case where more than two thousand dollars ($2,000) is involved and to deny the insured or beneficiary the right of a trial by jury. Should the chancellor hold adversely to the insurance company, no relief is awarded the injured party. He must then seek a court of law and again litigate with the insurance company his rights against it. Had the state not passed such a statute and the insurance company not entered into the agreement, no one could urge that the insurance company could apply to a court of equity to cancel the policy after loss. In taking jurisdiction of this cause, did not the Circuit Court of Appeals err and enable the respondent to perpetrate a fraud upon the people of the State of Illinois and with impunity violate its express agreement under which it was permitted to do business in the state and still retain all the benefits of its contract with the state? It could not do business within the limits of the state without first securing its license under this written agreement. The agreement was one the state had the right to exact and is legally binding.

The respondent refrains from removing the suit brought against it in the state court, but violates the spirit and essence of its agreement by appealing to the chancery side of the Federal Court, alleging that it made this contract, and if it violates its terms will be denied the right to further carry on its business in the State of Illinois. Upon this ground it asks a court of equity to relieve it from a binding agreement, fairly entered into, and, at the same

time, deprive a person having a claim against it for a loss under a policy, from having her action tried by a law court, which otherwise would have exclusive cognizance of the suit. And what is the answer given by the Court of Appeals to this most remarkable request? Substantially this:

It is true you entered into a legal contract not to remove suits brought against you in the state courts to the Federal Courts, and this was done as a condition precedent to procuring a license without which you could not do business in the state. Your agreement is lawful and binding. While you have the right to remove the cause brought against you to the Federal Court, such action being in contravention of your agreement, will likely result in a revocation of your license. You desire to obtain all the benefits of your contract, but avoid its burdens. Not only this, but more will be done for you: we will give you the right to have your case tried in the Federal Court and because of this contract have the same tried in equity denying your opponent her constitutional right to a trial by jury. If you fail to maintain your bill in equity, your adversary may then bring her suit at law against you, which could have been done in the first instance had you not entered into this lawful agreement with the state to try your cause with her in the state tribunal.

II.

THE CIRCUIT COURT OF THE UNITED STATES CANNOT ENJOIN AN ACTION IN THE STATE COURT.

It is set up in the amended and supplemental bill and found by the master that prior to the time of the filing of the bill of complaint an action at law had been instituted

against the respondent in the Superior Court of Cook County, Illinois, a summons issued therein and placed in the hands of the sheriff for service. (Rec., 40.) Under the law of the State of Illinois jurisdiction attaches by the filing of a praecipe and issuance of a summons thereunder.

Collins v. *Manville*, 170 Ill., 614.

Schroeder v. *Merchants & Mechanics Ins. Co.*, 104 Ill., 71.

Farmers Loan & Trust Co. v. *Lake St. Elevated R. R. Co.*, 177 U. S., 51.

Section 720 of the United States Statutes provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of the state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The present action is a direct violation of both the letter and spirit of the statute, nor could it be maintained though such a statute did not exist. The case of *Diggs* v. *Wolcott*, 4 Cranch., 179, is on all fours with the present suit. There a suit at law was brought in a state court upon two promissory notes which defendants claimed had been obtained from them by fraudulent misrepresentations; thereupon the defendants filed a bill in chancery to have the notes cancelled for fraud and to perpetually enjoin the proceedings at law for a recovery thereon. The chancery suit was removed to the Circuit Court of the United States and a decree there entered enjoining the further prosecution of the law action in the state court, and providing for the cancellation of the notes. Upon appeal the cause was reversed by this court, for the reason that the Circuit Court of the United States had no jurisdiction to enjoin proceedings in the state court.

In *Peck* v. *Jenness*, 7 How., 624, Mr. Justice Grier says:

It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity; for, if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy* v. *Earl of Cassillis*, 2 Swanst., 313, Lord Eldon, at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved, because it was admitted if the court of chancery could in that way restrain proceedings in a foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court."

* * * "In the case of *Diggs* v. *Wolcott* (4 Cranch., 119) the decree of the Circuit Court had enjoined the defendant from proceeding in a suit pending in a state court, and this court reversed the decree, because it had no jurisdiction to enjoin proceedings in a state court."

To the same effect is:

Riggs v. *Johnson Co.*, 6 Wall., 195.

Orton v. *Smith*, 18 How., 265.

Haines **v.** ***Carpenter***, 91 U. S., 267.

In re Sawyer, 124 U. S., 219.

Farmers Loan & Trust Co. v. *Lake Street Elevated R. R. Co., supra.*

Prior to the bringing of the present suit, the Superior Court of Illinois had jurisdiction over the controversy which respondent seeks to have adjudicated in the Federal Court. Whether this proceeding is stayed by the issuance of an injunction or by decreeing the policy of insurance held by petitioner to be canceled, the result is the same. The effect of the action of the Federal Court is to deprive the state court of the power to adjudicate upon the matters submitted to it. The Federal Court and the state court are sitting in the same jurisdiction. To hold that the Federal Court in such a case may annul the proceedings in the state court or deprive that court of its right to pass upon petitioner's rights, is in direct violation of the rule of comity which has always existed between courts and might result in an unseemly scramble between the parties as to which court would first render a decree or judgment in the matter. It also would probably result in a collision between the powers of the two courts in the event that one would decline or refuse to acknowledge the supremacy of the other.

III.

THE DISCLOSURE MADE WAS SUFFICIENT NOTICE OF CABLE'S ILLNESSS.

The Circuit Court found that at the time the policy was delivered the agent of respondent, in reply to a question as to whether Mr. Cable was all right, was informed: "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." It was further held that this statement was made in good faith and without any intent to defraud respondent or conceal the real condition of the health of Cable, and that no

further inquiries were made in regard to Cable's health. (Pr. Rec., 148.) This finding of fact, while approved by the Court of Appeals, is said to have not been a full disclosure of the condition of Mr. Cable's health, and, therefore, a constructive fraud upon the respondent, such as to vitiate the policy. At the time of the making of this statement, it was the belief of the person receiving the policy and of the family and physician of Mr. Cable that he would recover from his then illness. (Pr. Rec., 29.)

We respectfully submit that the disclosure made by Mr. Lord to the agent of respondent was sufficient to put him upon guard and ample notice to the company of the then condition of Mr. Cable's health and that the delivery of the policy with such knowledge was a waiver of its provision concerning the delivery of the same during the good health of the insured.

Phoenix Life Insurance Co. v. *Raddin,* 120 U. S., 183.

Marston v. *Kennebec Ins. Co.,* 89 Me., 266.

German American Ins. Co. v. *Morris,* 100 Ky., 29.

Joyce on Ins., Sec. 1870.

Manhattan Life Ins. Co. v. *J. P. Willis & Bro.,* 60 Fed., 236.

IV.

UNDER THE FACTS THE REMEDY AT LAW OF RESPONDENT IS COMPLETE AND ADEQUATE.

The effect of a decree in the present case would not necessarily be a final adjudication as to the rights of the parties, should there be a dismissal of the bill. Every

defense had by the Insurance Company can be made in the suit brought in the state court. The question then arises whether such a clear and uncontroverted case of fraud has been made as will authorize the court to sustain the bill.

"The burden of proof is on the complainant, and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character, the complainant must show by clear and decisive proof:

First. That the defendant has made a representation in regard to material *fact.*

Second. That such representation was false.

Third. That such representation was not actually believed by the defendant, on reasonable grounds, to be true.

Fourth. That it was made with intent that it should be acted on.

Fifth. That it was acted on by complainant to his damage; and

Sixth. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

Southern Development Co. v. *Silva,* 125 U. S., 247.

Farnsworth v. *Duffner,* 142 U. S., 207.

Atlantic Delane Co. v. *James,* 94 U. S., 207.

Morse Arms Mfg. Co. v. *Winchester Repeating Arms Co.,* 33 Fed., 184.

In this last case a cross-bill was filed seeking to cancel a note for fraud, and the court held that as there was doubt about the question, the cross-bill must be dismissed and the defendant required to make his defense in an action at law. It is there said:

"That being the case, I am not satisfied that it is expedient to render an affirmative decree upon this cross-bill, but upon the other hand, to leave the liability of the Winchester Company upon the note to an action at law.

Hamilton v. *Cummings,* 1 Johns', Ch. 517.
Insurance Co. v. *Stanchfield,* 1 Dill., 424.

"The cancellation of an 'executed contract is an exertion of the most extraordinary power of a court of equity' (*Atlantic De Laine Co.* v. *James,* 94 U. S., 207) and, as the defense to the note is open to the Winchester Company hereafter, I have determined to dismiss the bill without prejudice to the right of the company to interpose its defenses in any action which may be brought, except the defense of fraud."

We respectfully submit the two several judgments of the Circuit Court of Appeals should be reversed, and directions given the Circuit Court to dismiss the amended and supplemental bill of complaint.

H. H. C. MILLER,
W. S. OPPENHEIM,
Solicitors for Petitioner.